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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THRIS VAN TAYLOR, Plaintiff, Cross-defendant and Appellant, v. RICKEY IVIE et al., Defendants, Cross-complainants and Appellants.	B206761, B225934 (Los Angeles County Super. Ct. No. BC268576)
THRIS VAN TAYLOR, Cross-complainant and Appellant, v. RICKEY IVIE et al., Cross-defendants and Appellants.	B206761, B225934 (Los Angeles County Super. Ct. No. BC317765)

APPEALS from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Reversed with directions.

Thris Van Taylor, in pro. per., for Plaintiff, Cross-defendant, Cross-complainant and Appellant.

Richardson & Fair, Manuel Domingez; Ivie, McNeill & Wyatt and Rickey Ivie for Defendants, Cross-complainants, Cross-defendants and Appellants.

Thris Van Taylor and Rickey and Eloise Ivie are next door neighbors. A property dispute has spawned contentious litigation between them. Both sides appeal a judgment after a jury trial challenging the disposition of several counts in various pleadings in these consolidated actions. We conclude that (1) the granting of summary judgment against the Ivies' cross-complaint for an equitable easement and a prescriptive easement was error; (2) Van Taylor has not established a right to quiet title; (3) the dismissal of Van Taylor's assault count was error; (4) the jury instructions on trespass and nuisance were prejudicially erroneous; and (5) Van Taylor failed to establish a basis for a permanent injunction. We therefore will reverse the judgment with directions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual Background*

Van Taylor owns and resides on the property immediately south of the property where the Ivies reside in the Ladera Heights community of unincorporated Los Angeles County. Van Taylor purchased his property in April 1988. The Ivies purchased their property from Kenneth and Rachel Fratto in June 2000. A cement block fence runs parallel to the line dividing the two properties. The upright stem of the fence stands completely within Van Taylor's property approximately 3 to 4 inches south of the property line. The Ivies and their predecessors for many years assumed that they owned the land immediately north of the fence and used and maintained that land as part of their backyard.

A dispute first arose in March 2001 when Van Taylor made a written demand that the Ivies vacate the thin strip of land north of the fence. The Ivies hired a surveyor at that time and learned that the property line was north of the fence.

2. *Action Commenced by Van Taylor and First Trial*

Van Taylor filed a complaint against the Ivies in February 2002 (Super. Ct. L.A. County, No. BC268576) alleging that a pear tree and shrubs on the Ivies' property encroach on Van Taylor's property, causing damage and interfering with the use and enjoyment of his property. He also alleges that the fence lies completely within his property, and that the Ivies have attached various items to the fence and have refused to remove those items. Van Taylor alleges counts for (1) intentional infliction of emotional distress; (2) trespass; (3) negligent trespass; (4) nuisance; (5) quiet title; and (6) an injunction.

The Ivies filed a cross-complaint against Van Taylor in April 2002 alleging that they and their predecessors have used and maintained the thin strip of Van Taylor's land north of the fence openly, continuously, exclusively and adversely for many years. They allege counts for (1) an equitable easement; and (2) a prescriptive easement.

The trial court (Hon. Malcolm Mackey) bifurcated the trial and heard the equitable issues first, without a jury. The court entered a judgment in March 2003 declaring the fence a party wall and granting the Ivies an easement to use and maintain the north side of the fence and the thin strip of Van Taylor's land north of the fence. The judgment also declared the pear tree to be owned in common by Van Taylor and the Ivies as coterminous owners. The court found in favor of the Ivies on Van Taylor's

counts for nuisance, quiet title and an injunction, and found in favor of the Ivies on their count for an equitable easement. The court concluded that the other counts were moot. Van Taylor appealed the judgment.

3. *Action Commenced by the Ivies*

The Ivies filed a complaint against Van Taylor in June 2004 (Super. Ct. L.A. County, No. BC317765) and filed a first amended complaint in October 2004 and a second amended complaint in August 2006. They allege in their second amended complaint that Van Taylor poisoned the pear tree and other plants north of the fence in or about November 2003. They also allege that he has harassed them by complaining to local government agencies about a barking dog and electrical equipment on the Ivies' property and by threatening to file another lawsuit. The Ivies allege counts for (1) trespass; (2) negligent destruction of personal property; (3) intentional destruction of personal property; (4) negligent infliction of emotional distress; (5) intentional infliction of emotional distress; (6) assault; and (7) invasion of privacy.

Van Taylor filed a cross-complaint against the Ivies in October 2004 and filed a first amended cross-complaint in January 2006. Van Taylor alleges that the Ivies attached a wooden lattice to the fence in March 2003 and that the pear tree, shrubs and other items encroach on his property, causing damage and interfering with the use and enjoyment of his property. Van Taylor also alleges that the Ivies caused their agents to enter his enclosed yard on several occasions in 2005 and that Rickey Ivie verbally threatened him from the public sidewalk in August 2005. Van Taylor alleges counts for

(1) intentional infliction of emotional distress; (2) assault; (3) trespass; (4) negligent trespass; (5) nuisance; and (6) an injunction.

4. *Reversal in Part and Affirmance in Part of the March 2003 Judgment*

On appeal from the March 2003 judgment declaring the fence a party wall and granting an easement in favor of the Ivies, we concluded as a matter of law based on undisputed facts that the fence is not a party wall. We concluded that the trial court's declaration of an easement in favor of the Ivies, its decision in favor of the Ivies on Van Taylor's counts for nuisance, quiet title and an injunction, and its determination that the other counts were moot all were based on the erroneous finding that the fence was a party wall. We therefore reversed the judgment in its entirety with the sole exception of the denial of relief on Van Taylor's count for intentional infliction of emotional distress, which we affirmed. (*Van Taylor v. Ivie* (May 23, 2005, B167277) [nonpub. opn.] pp. 13-14, 17, 19.)

We discussed at some length the issues to be addressed by the trial court on remand in an effort to assist in the resolution of those issues. (*Van Taylor v. Ivie*, *supra*, B167277, pp. 14-18.) We stated that a permanent injunction is a remedy for a continuing trespass or nuisance and that a court considering an injunction to cause the removal of an encroachment onto adjoining property must consider the equities and the relative hardships to both parties. A court must deny an injunction if it finds that the hardship to the defendant if an injunction were granted substantially outweighs the hardship to the plaintiff if an injunction were denied. (*Id.* at pp. 15-16.) We stated that the trial court on remand must consider the relative hardships to the parties and decide

whether to issue an injunction before deciding whether to declare an equitable easement in favor of the Ivies, and that the court could declare an equitable easement in favor of the Ivies only if it denied an injunction. (*Id.* at p. 18.)

We stated further that a quiet title action adjudicates adverse claims of interest in property, including a claim of an easement. We stated that the trial court on remand must decide whether to declare an equitable easement before ruling on the merits of quiet title, and that Van Taylor could prevail on his quiet title count if and only if the court denied an easement in favor of the Ivies. (*Van Taylor v. Ivie*, *supra*, B167277, pp. 16-17, 18.)

We also noted that the Ivies had stated at trial that they did not intend to pursue their count for a prescriptive easement and had stated that the count was "withdrawn." (*Van Taylor v. Ivie*, *supra*, B167277, p. 5.) We stated that the Ivies had effectively requested the dismissal of that count and abandoned it, and concluded, "Van Taylor is entitled to judgment in his favor on the count for a prescriptive easement." (*Id.* at pp. 17-18.) We directed the trial court to conduct further proceedings consistent with our opinion. (*Id.* at p. 19.)

5. *Rickey Ivie's Application for an Injunction to Stop Harassment*

Rickey Ivie filed an application for an injunction against Van Taylor to stop harassment on September 7, 2005 (Super. Ct. L.A. County, No. BS098998). He alleged that Van Taylor had harassed him and his family members by shouting profanities, verbally threatening him and peering over the fence to photograph guests in the Ivies' living room. A hearing on the application was scheduled for September 26, 2005. The

trial court in case No. BC317765 (Hon. Teresa Sanchez-Gordon) continued the hearing to October 17, 2005, conducted a hearing on the application on that date and took the matter under submission. The court granted the application and issued a restraining order to stop harassment on October 25, 2005.

Van Taylor filed an objection to the restraining order arguing that the trial court had failed to timely conduct a hearing on the application as required by Code of Civil Procedure section 527.6, former subdivision (d) and that the hearing on October 17, 2005, was improper because it was held in case No. BC317765 rather than case No. BS098998. The court issued a minute order on November 22, 2005, amending its order of October 17 nunc pro tunc to state that case No. BC317765 and case No. BS098998 were related and were consolidated for all purposes. The court stated that the omission was due to inadvertence and clerical error.

6. *Relief from Default and Consolidation of Cases*

The Ivies filed a motion in November 2005 for relief from default (Code Civ. Proc., § 473, subd. (b)) arguing that the dismissal of their count for a prescriptive easement was a result of mistake, inadvertence, surprise or excusable neglect. They filed a declaration by their attorney stating that she withdrew the count in the first trial after the trial court had announced its finding that the fence was a party wall and that

she did so because she believed that a prescriptive easement would have been duplicative of the relief awarded by the court. The trial court granted the motion.[1]

The Ivies moved to consolidate case No. BC268576 with the two previously consolidated cases (Nos. BC317765 & BS098998). The trial court granted the motion and ordered the three cases consolidated on January 12, 2006.[2]

7. *Van Taylor's Summary Judgment Motion*

Van Taylor filed a motion in June 2006 for "summary judgment" against the Ivies' cross-complaint in No. BC268576 and on Van Taylor's counts for trespass, nuisance, quiet title, assault and an injunction. He did not expressly seek "summary adjudication" of individual counts, but instead sought "summary judgment" on specified counts.

The Ivies opposed the motion arguing among other things that Van Taylor was not entitled to summary judgment because he had not shown that the entire action had no merit and that he was not entitled to summary adjudication because he had failed to move for summary adjudication. They also argued that there were triable issues of fact on the merits of the challenged counts.

The trial court (Hon. Mel Red Recana) granted the summary judgment motion in part and denied it in part in an order filed on September 13, 2006. The court concluded

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[1] We judicially notice the motion for request from default filed on November 17, 2005, and the minute order filed on January 27, 2006, granting the motion. (Evid. Code, § 452, subd. (d).)

[2] We judicially notice the minute order filed on January 12, 2006, granting the motion to consolidate the three cases. (Evid. Code, § 452, subd. (d).)

as a matter of law that the Ivies could not prove that their use of Van Taylor's property was hostile and under a claim of right, as necessary to establish a prescriptive easement. The court quoted statements made by Kenneth Fratto on the record at a hearing prior to the first trial on Van Taylor's motion to amend his complaint to name the Frattos as defendants. The court in its order quoted the following exchange from the reporter's transcript of that hearing:

The court: "You're not making a claim, are you, Mr. Fratto?"

Mr. Fratto: "Your honor, as I testified in my deposition, all I did was occupy what I thought was the property as described in the deed. And I had no idea that the wall was off the deed."

The court: "Okay."

Van Taylor's counsel: "The question is, are you making a claim, not are you—"

The court: "Well, you're not making a claim?"

Van Taylor's counsel: "Yes or no?"

Mr. Fratto: "I'm not making—I mean, I never made one."

The court: "He's not making a claim, no. That's why—this is smoke and mirrors."

The order stated further that the alleged equitable easement was derivative of the alleged prescriptive easement and, "The short period of time that the Ivies had used the strip of land and fence before Van Taylor took action to prevent further adverse use, and the absence of any substantial expenditures incurred by the Ivies versus the curtailment of Van Taylor's use and enjoyment of his property, the damages being incurred caused

by the adverse use, and the diminution of the property value show greater hardship for Van Taylor compared to the Ivies." The court therefore granted summary judgment against the Ivies' cross-complaint for an equitable easement and a prescriptive easement. The order stated with respect to the counts alleged in Van Taylor's complaint that there were triable issues of fact and that the summary judgment motion was denied as to those counts.

The Ivies filed a petition for writ of mandate in October 2006 challenging the order to the extent that it granted summary judgment in part. We summarily denied the petition on October 31, 2006 (B194236). The trial court filed a "Judgment" on November 20, 2006, denying the Ivies and relief on their cross-complaint.

8. *Voluntary Dismissal of the Ivies' Complaint and Rulings on Motions in Limime*

The Ivies filed a notice in October 2007 that they had settled with Van Taylor's insurer and later dismissed their complaint against Van Taylor in case No. BC317765. The trial court (Hon. Mel Red Recana) considered motions in limine in preparation for trial on the remaining counts alleged by Van Taylor in his complaint in case No. BC268576 and his cross-complaint in case No. BC317765.

The trial court stated that the statement in our prior opinion that Van Taylor was entitled to quiet title if and only if the court denied an easement in favor of the Ivies (*Van Taylor v. Ivie*, *supra*, B167277, p. 17) together with the granting of summary judgment against the Ivies' cross-complaint for an equitable easement and a prescriptive

easement compelled the conclusion that Van Taylor was entitled to judgment in his favor on his count for quiet title.[3]

The trial court also granted the Ivies' motion in limine to exclude any evidence that Rickey Ivie had assaulted Van Taylor. The court stated that in issuing a restraining order to stop harassment the court had decided that the Ivies did not assault Van Taylor. The court concluded that that decision was final and binding and precluded Van Taylor's counts for assault and intentional infliction of emotional distress. The court effectively dismissed those counts at that time, although no signed order of dismissal was filed and the ruling was not reflected in any minute order.

9. *Second Trial and Order of January 22, 2008*

A jury trial commenced in October 2007. The trial court instructed the jury on counts for trespass and nuisance. The jury returned a special verdict on December 12, 2007, answering "No" to the questions "Did Thris Van Taylor have exclusive possession of the land?" as to trespass and "Did defendants interfere with Thris Van Taylor's use or enjoyment of his property?" as to nuisance.

The trial court filed an order on January 22, 2008, signed by the judge, stating:

"**ORDER**

"Judgment is issued and entered this date in favor of Plaintiff Thris Van Taylor and against Defendants Rickey Ivie and Eloise Ivie as to the Quiet Title cause of action as well as the causes of action for Equitable and Prescriptive Easements.

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[3] The trial court's ruling apparently related to a motion in limine.

"Judgment is issued and entered this date in favor of Defendants Rickey Ivie and Eloise Ivie against Plaintiff Thris Van Taylor as to the causes of action for Trespass and Nuisance.

"The Court orders plaintiff's remaining cause of action for Injunction bifurcated from the plaintiff's Complaint, and a trial setting conference is set for Feb. 29, 2008 at 8:30 AM.

"The Court determines, based on the above Order, that there is no prevailing party in the action.

"SO ORDERED."

10. *Notices of Appeal*

The Ivies filed a notice of appeal from the order of January 22, 2008, stating that they were appealing the "judgment" entered on that date, the order of September 13, 2006, granting summary judgment, and the "judgment" entered on November 20, 2006. Van Taylor also filed a notice of appeal from the "judgment" entered on January 22, 2008. The appeals were designated case No. B206761.

11. *Van Taylor's Motions for Judgment Notwithstanding the Verdict and New Trial*

Van Taylor moved for judgment notwithstanding the verdict on his counts for trespass and nuisance. He also moved for a new trial on several grounds. The trial court denied both motions in February 2008.

12. *Separate Action Commenced by Van Taylor*

Van Taylor commenced a separate action against Rickey Ivie and others in February 2009 (Super. Cr. L.A. County, No. BC408629). Van Taylor filed a complaint alleging that Rickey Ivie and another defendant, while they were inspecting the fence in March 2007, threatened to physically harm Van Taylor if he touched the fence. Van Taylor also alleged that Rickey Ivie and another defendant intentionally or negligently caused him emotional distress. The trial judge assigned to the case, Judge Mel Red Recana, was the same judge who presided in the trial in these consolidated actions. Judge Recana recused himself in case No. BC408629, stating in a minute order:

"Given that the allegations in the BC408629 Complaint are so intertwined with the facts in BC268576 involving the same parties, these two cases should be related under C.R.C. 3.300[.] However, in the BC268576 jury trial, this Court considered the credibility of the witnesses and the evidence that will be proffered in BC408629. This Court can no longer be fair and impartial, therefore this Court recuses itself from hearing BC408629."

The trial court also declined to order the new case related to these consolidated actions at that time. Van Taylor filed a first amended complaint in November 2009 alleging counts against Rickey Ivie and others for (1) assault; (2) intentional infliction

of emotional distress; (3) negligent infliction of emotional distress; and (4) invasion of privacy.[4]

13. *Statement of Decision and Judgment on Injunctive Relief*

Counsel filed briefs on Van Taylor's request for an injunction, and the trial court heard oral argument in May 2010. Each side submitted a proposed judgment. The court filed a statement of decision on June 17, 2010, stating that judgment had already been entered in favor of Van Taylor on his count for quiet title and on the Ivies' counts for an equitable easement and a prescriptive easement. The statement of decision also stated:

"The Court already found on November 20, 2006 that ' . . . The short period of time that the Ivies had used the strip of land and fence before Van Taylor took action to prevent further adverse use, and the absence of any substantial expenditures incurred by the Ivies versus the curtailment of Van Taylor's use and enjoyment of his property, the damages being incurred caused by the adverse use, and the diminution of the property value shows greater hardship for Van Taylor compared to the Ivies.'

"In balancing the respective hardships of the parties, the Court, in addition to the above finding, also considered the following: defense counsel observed that requiring the defendants to remove the attachments to the north side of the fence would be problematic because the process of removal could damage the fence and defendants'

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[4] We judicially notice the complaint filed on February 27, 2002, the minute order filed on May 8, 2009, and the first amended complaint filed on November 22, 2009, in case No. BC408629. (Evid. Code, § 452, subd. (d).)

entry into plaintiff's land may be the basis of another lawsuit for trespass on his property. Except for the fiberglass, lattice and the pvc pipe, the plants and the attachments on the fence were placed there by defendants' predecessor in interest. Plaintiff expressed his willingness to remove the attachments as well as the pear tree and the honeysuckle shrubbery if authorized by the court. Only the plaintiff would benefit from the granting of the injunctive relief. Therefore, it would be in the best interests of the parties that the Court should authorize Van Taylor to remove the attachments to the fence, the pear tree and other plants.

"WHEREFORE, the Court finds for Plaintiff Thris Van Taylor in his cause of action for Injunction against defendants Rickey Ivie and Eloise Ivie.

"The Court does not grant any monetary damage claimed by Van Taylor. Plaintiff's causes of action for Trespass and Nuisance and Damages were already tried by a jury. The jury returned verdicts for the defendants and the parties have appealed."

The trial court entered a judgment that same day awarding a permanent injunction in favor of Van Taylor. The judgment states that the Ivies, as soon as possible, must allow Van Taylor to enter their property to remove all of their property from Van Taylor's land and fence, including 16 enumerated items. The judgment also prohibits the Ivies from entering or using Van Taylor's land in any manner. The judgment does not expressly address the disposition of the other counts.

14. *Notices of Appeal*

The Ivies filed a notice of appeal from the judgment of June 17, 2010. Van Taylor also filed a notice of appeal from the judgment. The appeals were designated case No. B225934. We consolidated case No. B206761 with case No. B225934.

15. *Trial, Judgment and Appeal in Van Taylor's Separate Action*

A jury trial in case No. BC408629 in November 2011 concluded with a directed verdict in favor of Rickey Ivie on the counts for emotional distress and invasion of privacy and a jury verdict favor of Rickey Ivie on the assault count. Van Taylor appealed the judgment. The appeal was designated case No. B239275 and has not been consolidated with the present appeals.

CONTENTIONS

Van Taylor challenges the judgment in favor of the Ivies on his counts for trespass, nuisance, assault and intentional infliction of emotional distress and the trial court's failure to award him damages, attorney fees and costs as the prevailing party. He contends in his appeal (1) the court erroneously instructed the jury on his counts for trespass and nuisance; (2) the evidence does not support the verdict on those two counts; (3) this court in our prior opinion conclusively decided those counts in his favor, and the trial court was bound by those determinations under the doctrine of law of the case; (4) the judgment in his favor on the counts for an equitable easement, a prescriptive easement and quiet title conflict with the jury's findings of no trespass and no nuisance, so the jury's findings cannot stand; (5) the trial court erred by failing to issue a permanent injunction before submitting the trespass and nuisance counts to the jury

and by denying his motions for a directed verdict, judgment notwithstanding the verdict and a new trial; (6) the adjudication of the restraining order to prevent harassment does not preclude his counts for assault and intentional infliction of emotional distress; (7) the trial court erred by denying his motion for a mistrial relating to comments made by Rickey Ivie on the witness stand during a break in the proceedings; (8) the trial court erred by allowing the Ivies to testify as to their state of mind regarding the alleged trespass and nuisance; (9) the trial court erred by allowing witnesses to testify regarding documents that should have been but were not produced in an exchange of expert witness information; (10) he is entitled to damages for the Ivies' wrongful use of his property and for depreciation, and he is entitled to attorney fees and costs as the prevailing party; and (11) the trial court erroneously refused his request to call a rebuttal witness.

The Ivies challenge the granting of summary judgment against their counts for an equitable easement and a prescriptive easement, the award of quiet title in favor of Van Taylor and the permanent injunction against them. They contend in their appeal (1) the trial court erred by granting a partial summary judgment in favor of Van Taylor when he did not move for summary adjudication in the alternative, and the ruling was incorrect on the merits; (2) Van Taylor is not entitled to a permanent injunction because the jury found against him on his counts for trespass and nuisance, and the injunction is overbroad and unreasonable; and (3) the award of quiet title in favor of Van Taylor is based on the erroneous granting of summary judgment against the Ivies' counts for an equitable easement and a prescriptive easement and therefore is also erroneous, and

additional evidence presented in the jury trial shows that the Ivies are joint owners of the fence together with Van Taylor.

DISCUSSION

1. *One Final Judgment*

A judgment is the final determination of the rights of the parties in an action or proceeding. (Code Civ. Proc., § 577.) A judgment terminates the litigation between the parties on the merits of the case and leaves nothing to do other than to enforce what has been determined. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.) Regardless of how it is denominated by the trial court, a decision is not a judgment if issues on the merits of the case remain to be decided between the parties. (*Ibid.*)

The "one final judgment" rule provides that an appeal may be taken only from the final judgment in an action and that interlocutory orders generally are not appealable unless they are made appealable by statute. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756; *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696-697; see Code Civ. Proc., § 904.1.) Interlocutory orders involving the merits, necessarily affecting the judgment or substantially affecting the rights of a party are reviewable on appeal from the judgment. (Code Civ. Proc., § 906.)

An order granting summary judgment is neither a judgment nor an appealable order. (*Richards v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 304, 311, fn. 2; *Zavala v. Arce* (1997) 58 Cal.App.4th 915, 924, fn. 7.) The appeal is from the judgment later entered. (*Richards, supra,* at p. 311, fn. 2; *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) The "Judgment" filed on November 20,

2006, based on the granting in part of Van Taylor's motion for summary judgment was not a judgment because other counts still remained to be determined between the parties. We conclude that neither the order granting a partial summary judgment nor the ensuing "Judgment" was appealable. We therefore reject Van Taylor's argument that the Ivies failed to timely appeal the summary judgment.

The order entered on January 22, 2008, after the jury trial, was not a judgment because whether to award an injunction and the scope of any injunctive relief remained to be decided. The judgment filed on June 17, 2010, in contrast, was a final judgment because it finally determined the rights of the parties in these consolidated actions. Although the judgment addresses only the injunction and fails to mention the jury verdict or the disposition of other counts, the significant interlocutory rulings are reviewable on appeal from the judgment. (Code Civ. Proc., § 906.) In light of the notices of appeal from the judgment of June 17, 2010, we conclude that the notices of appeal from the order of January 22, 2008, are superfluous and ineffectual.

2. *Van Taylor Is Not Entitled to Summary Judgment on the Easement Counts*

a. *Summary Judgment Versus Summary Adjudication*

Summary judgment is proper only if there is no triable issue of material fact and the moving party is entitled to a judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A party challenging all of the counts alleged in a complaint or a cross-complaint is not entitled to a judgment in its favor as a matter of law if other counts between the same parties remain undecided and unchallenged. The proper

procedure in those circumstances is a motion for summary adjudication on specified counts (*id.*, subd. (f)). We need not decide whether Van Taylor's failure to move for summary adjudication is dispositive, however, because we conclude that he is not entitled to summary adjudication on the merits.

b. *Prescriptive Easement*

A prescriptive easement is established by use of land that is (1) open and notorious, (2) continuous and uninterrupted, and (3) adverse to the true owner, and that is all of these things (4) for a period of five years. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570; *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321-322; Civ. Code, § 1007; Code Civ. Proc., § 321 [five-year period].) Periods of prescriptive use by successive owners of the dominant estate can be "tacked" together if these elements are satisfied. (*Miller v. Johnston* (1969) 270 Cal.App.2d 289, 295; see Rest.3d Property, Servitudes, § 2.17.) Whether each of these elements is satisfied is a question of fact. (*Warsaw*, *supra*, 35 Cal.3d at p. 570.)

The term "adverse" in this context is essentially synonymous with "hostile" and "under a claim of right." (*Aaron v. Dunham* (2006) 137 Cal.App.4th 1244, 1252; *Felgenhauer v. Soni* (2004) 121 Cal.App.4th 445, 450.) The claimant need not believe or claim that his or her use or possession is legally justified. (*Aaron*, *supra*, at p. 1252; *Felgenhauer*, *supra*, at p. 450.) The parties need not affirmatively dispute ownership. (*Gilardi v. Hallam*, *supra*, 30 Cal.3d at p. 322.) Instead, "the rule is settled in California that the requisite hostile possession and claim of right may be established when the occupancy or use occurred through mistake." (*Ibid.*; see Rest.3d Property, Servitudes,

§ 2.16, com. f, p. 229.) The claimant's use or possession is not adverse to the owner if the claimant recognizes the owner's potential claim and expressly or impliedly demonstrates an intent to claim a right of use only if the disputed ownership is resolved in the claimant's favor. But such an intent cannot be inferred from the mere fact that the claimant mistakenly believes that he or she is the owner. (*Gilardi, supra,* at p. 326; see Rest.3d Property, Servitudes, § 2.16, com. f., p. 229 [stating that the user need not "claim entitlement to a servitude or show color of title," but "must not act in such a way as to lead the owner to believe that no adverse claim is asserted"].)

The trial court here concluded that the Ivies could not prove that their use of the property was hostile and under a claim of right because their predecessor, Kenneth Fratto, denied ever having asserted a hostile claim. In our view, Fratto's statements showed only that he mistakenly believed that he owned the property and was unaware of any ownership dispute.[5] Under the authorities discussed above, his use of the property under a mistakenly belief that he owned the property constitutes adverse use, and his failure to affirmatively assert a hostile claim is irrelevant. We conclude that the trial court erred by granting a partial summary judgment on this basis. Van Taylor has shown no other basis to justify the summary adjudication of the count for

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[5] Although Fratto's statements quoted by the trial court apparently were not sworn testimony, the record also contains similar statements made by Fratto under oath. Fratto testified in the first trial that he openly used the property immediately north of the fence but did not affirmatively claim ownership of that property.

a prescriptive easement, so we conclude that he is not entitled to summary adjudication of this count.[6]

c. *Equitable Easement*

An easement may be created in equity in favor of a property owner to allow use of adjoining property. (*Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1008-1009; *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 265.) A court deciding whether to create an equitable easement must consider the relative hardships to the parties in the same manner that a court considers the relative hardships in deciding whether to issue an injunction prohibiting use of adjoining property. (*Tashakori*, *supra*, at p. 1009; *Linthicum*, *supra*, at p. 265.) The question whether to create an equitable easement is the flip side of the question whether to issue an injunction prohibiting use, and the denial of an injunction effectively grants the user the right of use. (*Linthicum*, *supra*, at p. 265.)

The trial court here concluded that the Ivies could not establish an equitable easement because their period of use was too short and because they had made no substantial expenditures, while Van Taylor would suffer curtailed use and enjoyment of his property, damages caused by the Ivies' use of his property and a diminution in the

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[6] We reject Van Taylor's argument that the trial court's granting of relief from the dismissal of the Ivies' count for a prescriptive easement was contrary to the law of the case established by our prior opinion. Our direction to the trial court to enter a judgment in favor of Van Taylor pursuant to the Ivies' voluntary dismissal of that count did not preclude the granting of relief from default under Code of Civil Procedure section 473, subdivision (b) based on circumstances that did not appear in the record, and that we therefore did not consider, pursuant to a request for relief from default that postdated our opinion.

value of his property. The parties presented conflicting evidence on the summary judgment motion as to the extent to which the Ivies' use of Van Taylor's property has interfered with the use and enjoyment of his property, the diminution in value of his property resulting from the Ivies' use and other damages caused by the Ivies' use. We conclude that this conflicting evidence created triable issues of material fact precluding summary adjudication of the count for an equitable easement.

Moreover, we believe that the trial court erred to the extent that it refused to consider the use of Van Taylor's property by the Ivies' predecessors in interest. In our view, the duration of use, including use by predecessors in interest, is a factor to consider in weighing the equities and the relative hardships. (See *Tashakori v. Lakis*, *supra*, 196 Cal.App.4th at p. 1014.) We also note that damages resulting from the use may be awarded in granting an equitable easement (*Linthicum v. Butterfield*, *supra*, 175 Cal.App.4th at p. 268; *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 559), so the existence of damages does not necessarily weigh against the creation of an equitable easement.

3. *Van Taylor Has Not Established a Right to Quiet Title*

The trial court concluded that Van Taylor was entitled to quiet title because he had defeated the Ivies' claims for a prescriptive easement and an equitable easement. In light of our conclusion that Van Taylor is not entitled to summary adjudication of those counts, however, the parties' conflicting claims to the property are unresolved. Van Taylor therefore has not established a right to quiet title at this time, so the judgment on that count must be reversed.

4. *The Dismissal of Van Taylor's Counts for Assault and Intentional Infliction of Emotional Distress Was Error*

The dismissal of Van Taylor's counts for assault and intentional infliction of emotional distress was based on the doctrine of collateral estoppel. Whether collateral estoppel applies in these circumstances is a question of law that we review de novo. (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 618.)

Collateral estoppel, or issue preclusion, precludes the relitigation of issues argued and decided in prior proceedings. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) " 'Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]' [Citation.]" (*Ibid.*) " 'The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. [Citation.]' [Citation.]" (*Id.* at pp. 511-512.)

Code of Civil Procedure section 527.6, subdivision (i) authorizes an injunction to prohibit harassment if the trial court finds by clear and convincing evidence that the petitioner has suffered unlawful harassment. "Harassment" is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct

directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (*Id.*, subd. (b)(3).) The statute does not state that the petitioner must be innocent of harassment to obtain an injunction. Although Van Taylor argued in opposing the petition that Rickey Ivie had assaulted him, we conclude that whether Rickey Ivey assaulted Van Taylor and whether his conduct toward Van Taylor constituted an intentional infliction of emotional distress were not issues that were necessarily decided in ruling on the petition. We therefore conclude that the dismissal of Van Taylor's counts for assault and intentional infliction of emotional distress based on collateral estoppel was error.

5. *The Jury Instructions and Special Verdict Questions on Trespass and Nuisance Were Prejudicially Erroneous*

a. *Standard of Review*

We review a claim of instructional error de novo and independently determine whether the instruction correctly stated the law. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298.) An instructional error was prejudicial only if it seems probable that the error prejudicially affected the verdict. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) In making this determination, we must consider "(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. [Fn. omitted.]" (*Id.* at pp. 580-581.)

b. *Trespass*

Trespass is an unlawful interference with the plaintiff's interest in the exclusive possession of real property, ordinarily by unauthorized entry. (*Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233.) Owners and tenants generally have the right to exclude others from occupying real property. (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390.) The interference must result from an intentional, reckless or negligent act or an ultra hazardous activity. (*Smith v. Lockheed Propulsion Co.* (1967) 247 Cal.App.2d 774, 784; see *Wilson*, *supra*, at p. 233; Rest. 2d Torts, §§ 158, 165.) The defendant's mistaken belief that he or she had a right to enter the land is no defense unless that belief was induced by the plaintiff's conduct.[7] (*Miller v. National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1480-1481; See Rest.2d Torts, § 164.)

A plaintiff seeking both the legal remedy of damages for a past trespass and the equitable remedy of an injunction to prevent a future trespass, as Van Taylor does here, is entitled to a jury trial on the factual issues with respect to the damages remedy. (*Pacific Western Oil Co. v. Bern Oil Co.* (1939) 13 Cal.2d 60, 68-69 (*Pacific Western Oil*).) The jury's determination of those factual issues is binding on the trial court later deciding the equitable issues with respect to an injunction. (*Ibid.*)

Any person who actually occupies real property can maintain an action for trespass as long as he or she has a right of possession superior to that of the defendant.

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[7] Van Taylor correctly argues that the Ivies' misunderstanding as to the location of the property line is no defense to trespass. We need not decide whether he has shown prejudicial error in the admission of evidence of the Ivies' state of mind because we conclude that he has shown prejudicial error on other grounds.

(*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246; *Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774.) The plaintiff need not occupy every inch of the property to qualify as a person who occupies the property. Instead, a plaintiff who occupies property can maintain an action for trespass against an encroacher who occupies part of the property without permission. (*Brown Derby Hollywood Corp. v. Hatton* (1964) 61 Cal.2d 855, 858.)

The trial court here modified and instructed the jury on CACI No. 2000 as follows:

"Plaintiff claims that defendants trespassed on his property. To establish this claim, plaintiff must prove all of the following:

"1. That plaintiff (a) owned (b) occupied (c) controlled (d) exclusively possessed the property;

"2. That defendant intentionally, recklessly, or negligently entered plaintiff's property[;]

"3. That plaintiff did not give permission for the entry or that defendant exceeded plaintiff's permission; and

"4. That plaintiff was actually harmed; and

"5. That defendant's entry was a substantial factor in causing plaintiff's harm. Entry can be on, above, or below the surface of the land."

The first element of CACI No. 2000 unmodified reads, "That [*name of plaintiff*] [owned/leased/occupied/controlled] the property." The trial court substituted "exclusively possessed" for the word "leased" in CACI No. 2000. In addition, rather

than select one of the four bracketed alternative words in the first element or state more than one of those words in the disjunctive, the court required Van Taylor to prove all four of the items (a) through (d). This was error. A plaintiff need not own, occupy, control and exclusively possess the property to prevail in an action for trespass. Instead, a person who owns but does not occupy the property can prevail in an action for trespass if the property is unoccupied (*Smith v. Cap Concrete, Inc.*, *supra*, 133 Cal.App.3d at p. 774), as can a lessee who occupies but does not own the property (*Brown Derby Hollywood Corp. v. Hatton*, *supra*, 61 Cal.2d at p. 858).

The principal problem here involved the instruction and special verdict requirement that Van Taylor must "exclusively possess" the property. "Possession" as used in the caselaw in this context is a legal term that refers generally to the right to exclude others from the property. (See 1 Dobbs et al., Law of Torts (2d ed. 2011, § 52, pp. 135-136; 1 Harper et al., Torts (3d ed. 2006) § 1.2, pp. 6-7; Rest.3d, Torts, Liability for Physical and Emotional Harm (Tent. Draft No. 6, Mar. 2, 2009) § 49 [defining a "possessor of land" for purposes of a duty of care].) As these authorities explain, "possession" in a legal sense is not necessarily limited to physical occupation. The term "exclusive possession," even more than "possession," is likely to suggest to lay jurors that the plaintiff must physically occupy all of the property to the exclusion of any other person. But such a requirement would preclude any trespass action against an encroacher. That cannot be and is not the law.

The first question on the special verdict form was, "Did Thris Van Taylor have exclusive possession of the land?" The Ivies' counsel stated in closing argument that

the answer to this question was easy and that Van Taylor had no exclusive possession because he never entered or maintained the thin strip of property north of the fence. The jury answered "No" to this question despite the undisputed evidence that Van Taylor owns and occupies the property south of the fence and that his property extends 3 to 4 inches north of the fence. We conclude that the instruction and the special verdict form were prejudicially misleading. There can be no reasonable doubt that Van Taylor actually occupies the property and that his possessory interest is sufficient to maintain an action for trespass. It is undisputed that the Ivies have encroached on the thin strip of Van Taylor's land north of the fence and that they intentionally entered the property. It is also undisputed that vegetation from the Ivies' pear tree has fallen on Van Taylor's property south of the fence, which provides another basis to establish a trespass if the fallen vegetation resulted from the Ivies' intentional, reckless or negligent conduct and if the other essential elements are satisfied.

On remand, the jury must be instructed that the first element of CACI No. 2000 is established.[8]

c. *Nuisance*

A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of land. (Civ. Code, § 3479; *San Diego Gas & Electric v. Superior*

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[8] Contrary to Van Taylor's argument, we did not decide in our prior opinion that he had established all of the elements of his counts for trespass and nuisance. Instead, we stated in reversing the judgment in part that the existence of a right to a jury trial on the trespass count depended on the gist of the action. (*Van Taylor v. Ivie, supra*, B167277, p. 14.) Van Taylor has not shown that he was entitled to a directed verdict or a judgment notwithstanding the verdict on those counts.

Court (1996) 13 Cal.4th 893, 937-938.) An activity may be both a trespass and a nuisance. (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1136 & fn. 6.)

A plaintiff seeking both the legal remedy of damages for a past nuisance and the equitable remedy of an injunction to prevent a future nuisance, as Van Taylor does here, is entitled to a jury trial on the factual issues with respect to the damages remedy. (*Moore v. San Vicente Lumber Co.* (1917) 175 Cal. 212, 214; cf. *Pacific Western Oil*, *supra*, 13 Cal.2d at pp. 68-69.) The jury's determination of those factual issues is binding on the trial court later deciding the equitable issues with respect to an injunction. (*Pacific Western Oil*, *supra*, at pp. 68-69.)

The law of nuisance protects a person's interest in the private use and enjoyment of land, while the law of trespass protects a person's interest in the exclusive possession of land. (*Wilson v. Interlake Steel Co.*, *supra*, 32 Cal.3d at p. 233; Rest. 2d Torts, § 821D, com. d, pp. 101-102.) A person need not physically occupy the property or have a right of exclusive possession to prevail in an action for nuisance, but need only have a right of use, such as an easement. (See Rest. 2d Torts, § 821E; 1 Harper et al., Torts, *supra*, § 1.23, p. 97.)

The trial court here modified and instructed the jury on CACI No. 2021 as follows:

"Plaintiff claims that defendants interfered with plaintiff's use and enjoyment of his land. To establish this claim, plaintiff must prove all of the following:

"1. That plaintiff (a) owned (b) occupied (c) controlled (d) exclusively possessed the property;

"2. That defendant created a condition that was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;

"3. That this condition interfered with plaintiff's use or enjoyment of his land;

"4. That plaintiff did not consent to defendant's conduct;

"5. That an ordinary person would be reasonably annoyed or disturbed by defendant's conduct;

"6. That plaintiff was harmed;

"7. That defendant's conduct was a substantial factor in causing plaintiff's harm; and

"8. That the seriousness of the harm outweighs the public benefit of defendant's conduct."

The first element of CACI No. 2021 unmodified reads, "That [*name of plaintiff*] [owned/leased/occupied/controlled] the property." The trial court again substituted "exclusively possessed" for the word "leased" in the CACI instruction and again required proof of all four of the items (a) through (d) rather than selecting one of the four bracketed alternative words or stating more than one of those words in the disjunctive. This was error. A plaintiff need not own, occupy, control and exclusively possess the property to prevail in an action for private nuisance. Instead, the plaintiff need only have a right to use the property to satisfy the first element, as we have stated. As the owner and occupier of the property, Van Taylor clearly had the right of use.

On remand, the jury must be instructed that the first element of CACI No. 2021 is established.

The jury skipped to question No. 11 on the special verdict form after answering "No" to the first question, pursuant to the directions on the form. Question No. 11 stated: "Did defendants interfere with Thris Van Taylor's use or enjoyment of his property?" The jury answered "No" as to both Rickey Ivie and Eloise Ivie. Although question No. 11 did not expressly ask whether the Ivies had exclusive possession of the property, we believe that it is reasonably probable that the jury understood this question to encompass such a requirement, as we will explain.

The instruction on nuisance stated that to establish his claim that the Ivies "interfered with plaintiff's use and enjoyment of his land," Van Taylor must prove, among other things, that he owned, occupied, controlled and exclusively possessed the property. Question No. 11 on the verdict form used essentially the same language as the instruction by asking whether the Ivies "interfere[d] with Thris Van Taylor's use or enjoyment of his property?" The Ivies' counsel noted in closing argument that the first element of the trespass instruction was identical to the first element of the nuisance instruction, and stated that question No. 1 on the special verdict form, quoted above, was not repeated in the questions on nuisance only because there was no need to repeat the same question. He stated that the requirement of exclusive possession applied equally to trespass and nuisance, and argued that if the answer to question No. 1 was "No" the answer to question No. 11 also must be "No." In these circumstances, we believe that it is reasonably probable that the jury understood question No. 11 to

encompass the requirement that Van Taylor must have exclusive possession of the property and must be the only person physically occupying any part of the property. We conclude that the instruction on nuisance and the special verdict form were prejudicially misleading in this regard.

6. *Van Taylor Failed to Establish any Basis for an Injunction*

The trial court awarded an injunction in favor of Van Taylor based on its prior adjudication of the easement counts in his favor and its balancing of the relative hardships. The court apparently failed to consider, however, the absence of any finding of tortious misconduct by the Ivies.

A trial court may conduct a jury trial on legal issues and a nonjury trial on equitable issues arising in the same action. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156-157.) If the legal issues are decided first, the jury's factual findings are binding on the trial court deciding the equitable issues to the extent that the equitable issues are based on the same facts. (*Pacific Western Oil*, *supra*, 13 Cal.2d at pp. 68-69; *Hoopes*, *supra*, at pp. 158-161.)

A permanent injunction is an equitable remedy for a wrongful act. To be entitled to a permanent injunction, a plaintiff must both establish the elements of an underlying cause of action and show grounds for equitable relief. (*City of South Pasadena v. Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293; *Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) Van Taylor failed to establish all of the elements of any cause of action in the jury trial, and the jury's factual findings were binding on the trial court ruling on the request for an injunction. Van Taylor therefore

is not entitled to a permanent injunction at this time.[9] The trial court on remand may award a permanent injunction only if Van Taylor establishes the elements of a cause of action and the trial court, after considering the relative hardships, finds that there are grounds for equitable relief.

In light of our conclusions stated above, the parties' other contentions are moot.

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[9] We reject Van Taylor's contention that he was entitled to a permanent injunction before the trespass and nuisance counts were submitted to the jury for the same reason. Contrary to Van Taylor's argument, the statement in our prior opinion that the trial court "on remand first must consider the relative hardships and decide whether to issue an injunction, and should address the question of an equitable easement only if it denies an injuction" (*Van Taylor v. Ivie*, *supra*, B167277, p. 18) meant only that the court must consider the relative hardships and decide whether to issue an injunction before deciding whether to grant an equitable easement, not that the court must decide whether to issue an injunction before deciding the merits of the trespass and nuisance counts.

DISPOSITION

The judgment entered on June 17, 2010, is reversed with directions to (1) vacate the order granting summary judgment dated September 13, 2006, and the "Judgment" dated November 20, 2006; (2) vacate the order filed on January 22, 2008, awarding quiet title in favor of Van Taylor; and (3) conduct further proceedings consistent with the views expressed in this opinion. Each side must bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.